84-1748

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROYCE DAVID HEBERT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. WHAT STANDARD SHOULD BE APPLIED TO REVIEW A WARRANT CONTAINING INFORMATION GAINED FROM AN ADMITTEDLY ILLEGAL PRIOR SEARCH OF THE SAME PREMISES: THE *FRANKS* "REDACTION" ANALYSIS APPLIED BY THIS COURT IN *U.S. V. KARO* OR THE "ATTENUATION" ANALYSIS UTILIZED BY THIS COURT IN *SEGURO V. U.S.?*

2. WHETHER THE FRUITS OF A RESIDENTIAL SEARCH SHOULD BE ADMITTED WHERE A SUBSTANTIAL PORTION OF THE SEARCH WARRANT AFFIDAVIT FOR THOSE PREMISES WAS COME AT BY THE EXPLOITATION OF A PRIOR, ILLEGAL, WARRANTLESS SEARCH OF THOSE SAME PREMISES, THAT SAME DAY?

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Royce David Hebert, the Petitioner herein, prays that a Writ of Certiorari, issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this cause February 11, 1985.

OPINION BELOW

The Opinion of the Court of Appeals is reported at 753 F.2d 1301 and is printed as Appendix "A" hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1985 and the mandate returned on

March 5, 1985. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) by timely filing this Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in Court Below:

On May 3, 1983, Petitioner ROYCE DAVID HEBERT was charged in a four count indictment with conspiring to distribute [Count One], aiding and abetting the distribution [Count Two] and unlawfully distributing [Count Four] marijuana.

Prior to trial, Petitioner Hebert moved to suppress all evidence seized from his Austin, Texas home (evidence which served as the only basis implicating Hebert in this offense) arguing that same was the fruit of a prior illegal warrantless search of those same premises.

Although agreeing that the prior warrantless entry of his property by DEA Agent Braziel constituted a "severe invasion" of Hebert's premises, the District Court, after hearing on his Motion, denied same.

Consequently, Hebert entered a plea of guilty to one count of conspiracy [21 U.S.C. § 841(a)(1)], reserving his right to appeal the District Court's denial of his motion to suppress. On March 23, 1984, Appellant was found guilty and sentenced to five years incarceration and a $15,000 fine. On the 11th day of February, 1985, the Fifth Circuit Court of Appeals affirmed Appellant Hebert's conviction. While agreeing with the District Court that Agent Braziel's entry on the premises was illegal, the Court below concluded that the warrant was based on sufficient probable cause and Agent Braziel's prior illegal observations constituted "only a small part of the information presented to the magistrate".

Appellant timely files this Application for Certiorari, seeking review by this Court.

STATEMENT OF RELEVANT FACTS

CONTESTED SEARCH

On November 2, 1982, Federal, State and local officers searched Appellant Hebert's residence at 1713 Sylvan Drive, Austin, Texas, seizing the only evidence implicating Hebert in this offense [Rec. Vol. X, p. 10-11].

It is this search, based upon a warrant obtained and executed by DEA Agent Richard Braziel, that is the subject of this appeal.

THE WARRANT TO SEARCH HEBERT'S RESIDENCE WAS BASED UPON AFFIANT BRAZIEL'S SURREPTITIOUS, WARRANTLESS ENTRY UPON THOSE PREMISES

Agent Braziel's sworn affidavit to search Hebert's Sylvan Drive property recited observations Braziel ob-

tained by surreptitiously entering upon those same residential premises the day before.

> "The surveillance observed Aaron Maxwell, a Black male, exit JoJo's restaurant [sic] and enter the blue and white 1977 Chevrolet . . . and drive it to 1713 Sylvan Drive, in Austin, Texas, a few blocks from the JoJo's restaurant [sic]. S/A Braziel observed the vehicle pull into the garage and the garage door then closed. S/A Braziel further heard a car trunk lid being opened. Further, S/A Braziel heard a noise like heavy objects being thrown in a trunk of a vehicle, after which the trunk lid slamed [sic]. The garage door opened and blue and white Chevrolet bearing 1984 Texas License plate PCQ658, driven by Aaron Maxwell backed out of the garage." [Rec. Vol. X, p. 144].

SURREPTITIOUS, WARRANTLESS ENTRY NOT MENTIONED IN AFFIDAVIT

However, what was not mentioned in the affidavit provided to the Magistrate is that Agent Braziel accomplished these observations only by surreptitiously entering Hebert's residential property, "creeping up" next to Hebert's house and pressing his nose and ear against the garage door. [Rec. Vol. X, at 55].

From this distance, with his nose pressed up to the garage door, Agent Braziel testified he "heard the trunk lid open on the vehicle", what he believed to be ". . . heavy object being thrown into the trunk" and smelled what he said was the "odor of marijuana coming from the . . . garage door" [Rec. Vol. X, p. 55].

FRUITS OF ILLEGAL SEARCH OF PRIVATE RESIDENCE UTILIZED AS PROBABLE CAUSE TO OBTAIN WARRANT FOR SUBSEQUENT SEARCH OF THAT SAME ABODE

As a result of what Agent Braziel allegedly heard and smelled while the Chevrolet was at the Sylvan Drive address he ordered the arrest of Allen Granger, who was observed leaving the restaurant parking lot in that same Chevrolet which Aaron Maxwell had driven from the residence on Sylvan Drive [Rec. Vol. X, pp. 56-71]. Agent Braziel stated that after Granger's arrest he could detect the same "strong odor of marijuana coming from the 'vehicle' in which Granger was arrested" [Rec. Vol. X, pp. 56-7, 102]. This statement was in turn included in Braziel's affidavit as part of the probable cause asserted for the warrant to search Hebert's house on Sylvan Drive [Rec. Vol. II, p. 145].

Again, what Agent Braziel did not mention in his affidavit for a warrant to search Hebert's residence is the fact that the probable cause for arresting Granger in the first place was based in large part upon Agent Braziel's illegal observations at those same premises.

Here, Granger's arrest in the Chevrolet automobile was based, in substantial part, upon the fruits of the prior illegal, surreptitious entry of Hebert's Sylvan Drive residence and the fact that Braziel overheard what he believed to be the loading of the vehicle's trunk and smelled what he believed to be marijuana emanating from the garage where the Chevrolet was located. The government then utilized the fruits of that arrest as probable cause to re-enter and search that same residence.

MOTION TO SUPPRESS

Prior to trial Hebert moved to suppress the evidence discovered as a result of the search of his Sylvan Drive residence on November 2, 1982 [Rec. Vol. V, p. 111], arguing that Agent Braziel's initial warrantless activities in the bushes next to Hebert's garage door the day before constituted an illegal search and that without the fruits of this initial illegality or the stale information recited in the affidavit, probable cause to search the residence was lacking [See: Rec. Vol. V, pp. 105-109].

After hearings on the Motion to Suppress, the Trial Court concluded that when Agent Braziel surreptitiously entered Hebert's residential property "at night" and listened at the garage door, "pressing his nose to that door", same "constituted an invasion of the curtilage of that property sufficient to constitute a search without a warrant" [Rec. Vol. I, p. 15], noting that:

> "The curtilage of a private home is given a greater privacy expectation than an ordinary building or automobile. . . . These facts present a *severe invasion of privacy.*" (emphasis supplied) District Court's Order [Rec. Vol. I, p. 15].[1]

As a remedy for this "severe invasion" of Hebert's privacy the trial Court applied a *Franks v. Delaware* analysis and "struck from the affidavit" only the "statement in the affidavit regarding the three thuds heard

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1. See: *Fixell v. Wainwright*, 492 F.2d 480 (5th Cir. 1974) and *U.S. v. Davis*, 423 F.2d 974 (5th Cir. 1970) where the Court held a government agent's nighttime entry into an unfenced yard surrounding a private residence constituted a *"severe invasion of privacy"*. And see: *Oliver v. U.S.*, 104 S.Ct. 1735, 1742-3, n. 12, where this Court reaffirmed it's "recognition that the curtilage remains within the protection of the Fourth Amendment".

by Agent Braziel" while pressed against Hebert's garage door [Rec. Vol. I, p. 15].

The trial Court left undisturbed, however, Braziel's recitation that "[A]t the time of [Granger's] arrest Agent Braziel noticed the odor of marijuana coming from Granger's vehicle" [Rec. Vol. I, p. 13], even though there could be little question that Braziel's decision to arrest Granger in that vehicle was based in substantial part on the fact that Braziel had heard what he believed to be the loading of the auto's trunk and smelled what he believed to be the same odor of marijuana while that vehicle was inside Hebert's garage.

In effect the trial court allowed Braziel to utilize as support for a warrant to search a private residence, information gained as the result of an arrest which itself was based in substantial part upon a prior illegal entry of that very same residence that same day.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ANALYSIS IN *SEGURA V. UNITED STATES*:

THIS COURT HAS SUGGESTED SOMETHING MORE THAN SIMPLE *FRANKS* ANALYSIS IS NEEDED

In determining whether a search warrant for residential premises has been tainted by an admittedly illegal, prior, warrantless search of those same premises, the proper test is whether the prior illegal intrusion contributed "in any way to the discovery of the evidence seized under the warrant". *Segura v. U.S.* 468 U.S.____, 82 L. Ed.

2d 599 (1984). Such an "attenuation" test looks to whether the warrant search "was a means sufficiently distinguishable to purge the evidence of any taint arising from the entry". *Segura v. U.S.*, 468 U.S.____, 86 L.Ed.2d at p. 614. See also: *Brown v. Illinois*, 422 U.S. 590, 600 (1975); *Dunnaway v. New York*, 442 U.S. 200 (1975); *Florida v. Royer*, 103 S.Ct. 1319, 1328 (1983).

In applying such an "attenuation" analysis, this Court has looked to the purposefulness of the officer's conduct. *Brown v. Illinois*, 422 U.S. at p. 600 [listing the "purpose and flagrancy of the official misconduct" as a factor]; *U.S. v. Dunnaway, Supra; U.S. v. Parker*, 722 F.2d 179 (5th Cir. 1983); *U.S. v. Cruz*, 581 F.2d 535 (5th Cir. 1978) *en banc* [the information was discovered as a result of a search having no purpose other than their discovery].

There can be little doubt as to Agent Braziel's purpose in illegally entering the curtilage of Hebert's residence. It was to obtain information.

WHAT TEST TO APPLY: "REDACTION" VS. "ATTENUATION" ANALYSIS

A serious question in need of resolution is what test courts should apply when information obtained from a prior illegal entry is utilized to secure a warrant to re-enter and search those same premises: the *Franks* "redaction" analysis applied by the Court in *Karo* or the "attenuation" analysis utilized by the Court in *Segura*.

Three days before the decision in *Segura*, this Court in *U.S. v. Karo*, 468 U.S. 530, 82 L.Ed.2d 530 (1984) applied a *Franks v. Delaware* "redaction" analysis to

excise from a warrant information obtained by officers from the prior illegal monitoring of an electronic transponder placed within a home. *U.S. v. Karo, Supra,* at p. 544.

> "That information [from the beeper], which was included in the warrant affidavit, would also invalidate the warrant for the search of the house if it proved to be critical to establishing probable cause for the issuance of the warrant. However, if sufficient untainted evidence was presented in the warrant affidavit to establish probable cause, the warrant was nevertheless valid." *U.S. v. Karo, Supra,* at p. 544.

However, the Court took pains to note that the "monitoring of a electronic device such as a beeper is, of course, *less intrusive*" than a search. (emphasis supplied) *U.S. v. Karo, Supra,* at p. 541.

Conversely, the prior illegality here, just as that in *Segura* constituted a prior illegal *entry* onto private premises.

The police in *Segura* had illegally entered an apartment the day before a search warrant was obtained and executed for those premises. Unlike the instant facts, the affidavit there did not contain any information obtained as a result of the initial entry. Thus, the Court could have used the "redaction" analysis from *Franks v. Delaware* to sustain the validity of the search conducted pursuant to the warrant.

Instead, the Court, citing *Wong Sun v. United States,* 371 U.S. 471 (1963), focused upon whether the search warrant was a means sufficiently distinguishable to purge the evidence of any taint arising from the prior entry,

Segura, Supra, at p. 608. The Court ultimately concluded that suppression of the fruits of the search conducted pursuant to a warrant was unnecessary because "the illegal entry into [defendants'] apartment did not contribute in any way to discovery of the evidence seized under the warrant." The Court observed:

> "None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment; the information came from the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. It is therefore beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged. This evidence was discovered the day following the entry, during the search conducted under a valid warrant; it was the product of a search, that search, wholly unrelated to the prior entry. The valid warrant search was a 'means sufficiently distinguishable' to purge the evidence of any 'taint' arising from the entry." *Segura v. U.S., Supra,* 82 L.Ed.2d at p. 614.

It would be difficult to argue seriously that Agent Braziel's illegal observations at the Sylvan Drive residence the day before he included same in his warrant affidavit "did not contribute in any way to the discovery of evidence seized under the warrant", *Segura v. U.S.,*____ *Supra,* at p. 614.

The warrant to search Hebert's residence is not "attenuated" from, but rather is substantially based upon the prior illegal entry of that same residence, on that

same day. Agent Braziel's purpose in entering those premises was to gain information regarding the Chevrolet vehicle he had seen enter the garage. It was what Braziel heard and smelled while the car was inside that caused him to stop that vehicle and it was what he smelled at the time he arrested its occupants that he related to the Magistrate as probable cause to re-enter and search Hebert's residence. The sequence of these events are inextricably intertwined with the Agent's initial illegal entry of those premises. The fruits of these peradventures should have been suppressed. This Court should grant the Petition for Writ of Certiorari.

2. EVEN IF THE *FRANKS*' "REDACTION" ANALYSIS WERE APPROPRIATE, THE TRIAL COURT'S EXORCISM WAS INSUFFICIENT TO REMOVE THE TAINT.

As a remedy for what the trial Court below described as a "severe" invasion of Hebert's privacy, that Court excised the portion "regarding the three thuds heard by Agent Braziel".

If, as both Courts below suggest, the eavesdropping at the garage door constituted a "severe invasion of [Hebert's] privacy", then the only other information that was acquired by these officers which could have possibly ripened into probable cause was the odor of marijuana emanating from Granger's car after he was arrested.

However, arrest was based upon Agent Braziel's belief that marijuana was secreted in Granger's vehicle. Granger's car was seized because of what Agent Braziel had heard and smelled while eavesdropping at petitioner's garage door.

"Q. Why did you decide to stop and arrest Mr. Granger in the Chevrolet automobile?

A. Based on everything I just got through saying I felt like the vehicle was loaded with marijuana and no surveillance officers saw anything removed from the trunk of the car."

Therefore, Granger's arrest and the subsequent smell of marijuana from the Chevrolet are the direct fruit of Braziel's prior "severe invasion of privacy" of petitioner's home. Accordingly, it should not serve as probable cause to re-enter and search the same residence with a warrant.

To do so would allow officers to lift an illegal search by its own bootstraps, converting a prior illegal, warrantless search into probable cause to issue a warrant for the same residence.

Properly redacted, the affidavit did not set forth probable cause for a search of either 1713 Sylvan Drive or Granger's car.

It is clear that the trial court properly excised the portion of the affidavit "regarding the three thuds heard by Agent Braziel." However, at a minimum, the trial court should as well have excised that portion of the affidavit which recites that Agent Braziel smelled the odor of marijuana emanating from the trunk of the car in which Granger was arrested; that arrest being the direct and temporally proximate result of a prior warrantless illegal search of the very premises which the officers sought to reenter and search.

Agent Braziel should not have been allowed to utilize as support for a warrant to search this private residence

information gained as a result of an arrest which was itself based in substantial part upon a prior illegal entry of that same residence. The fruits of that search should have been suppressed. The Petition for Writ of Certiorari should be granted.

CONCLUSION

There is a serious question in need of resolution as to what test courts should apply when information obtained from a prior illegal entry is utilized to secure a warrant to re-enter those same premises. The recent decisions of the Honorable Court are in conflict. A Writ of Certiorari should issue to review the Judgment and Opinion of the Fifth Circuit and resolve this dispute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been mailed to the U.S. Attorney's Office, Western District of Texas, on this the 3d day of May, 1985.

GERALD H. GOLDSTEIN

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Clifford J. ANTONE,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Royce David HEBERT,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Mikal Habeeb AMUNY,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Aaron MAXWELL,
Defendant-Appellant.

Nos. 84-1299, 84-1302, 84-1308 and 84-1315.

United States Court of Appeals, Fifth Circuit

February 11, 1985.

Pursuant to their pleas, defendants were convicted in the United States District Court for the Western District

of Texas, James R. Nowlin, J., on marijuana conspiracy charges, and they appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) probable cause existed for warrantless arrests of certain defendants at restaurant; (2) district court had a sufficient factual basis to accept certain defendant's guilty pleas; (3) defendant, whose fingerprints were found only on a spiral-ring notebook in the house, lacked standing to contest search of the house which was found to have contained marijuana; and (4) search warrant was based on sufficient probable cause even without evidence supplied by DEA agent's illegal entry into house; thus, trial court's redaction of the search warrant and ruling admitting the evidence obtained in the search of defendant's residence were correct.

Affirmed.

Edward C. Prado, U.S. Atty., Sidney Powell, Archie Carl Pierce, Asst. U.S. Attorneys., San Antonio, Tex., for plaintiff-appellee.

Charles R. Burton, Michael Tigar, Amanda Birrell, Austin, Tex., for Antone.

Gerald H. Goldstein, Ralph A. Lopez, San Antonio, Tex., for Hebert.

Dick DeGuerin, Houston, Tex., for Amuny.

Michael Kennedy, Joseph Calluori, New York City, for Maxwell.

Appeals from the United States District Court for the Western District of Texas.

Before GEE, REAVLEY and RANDALL, Circuit Judges.

GEE, Circuit Judge:

The appellants, Clifford J. Antone, Mikal Habeeb Amuny, Aaron Maxwell, and Royce Hebert, were indicted on charges relating to marijuana possession and distribution. After the district court denied their pretrial motions to suppress evidence, the appellants each pleaded guilty to one count of conspiracy, reserving their rights to appeal the district court's rulings to this Court. We hold that the district court's rulings were correct and affirm the appellants' convictions.

The charges against the appellants in this case arise from the same factual background. Each appellant, however, advances different arguments in this appeal. Our opinion therefore first presents a summary of the facts of the case and then separately analyzes each appellant's claims.

I. Facts

During late October 1982, United States Customs Officer David Harrison received information from a confidential informant who had previously provided Harrison with information that led to six arrests and five convictions on marijuana charges. The informant stated that Allan Granger and a person named Randy were to meet Clifford Antone and Mikal Amuny in Austin, Texas to obtain a quantity of marijuana. The informant also said that the marijuana was to be flown to Austin, but that he did not know where the plane was to land.

Officer Harrison immediately relayed this information to Drug Enforcement Administration (DEA) Agent Richard Braziel in Austin. Agent Braziel called Robert Nesteroff, a narcotics officer with the Texas Department of Public Safety, and asked him to conduct surveillance of

Antone's and Amuny's residences and of a club operated by Antone. Nesteroff did so, but observed nothing out of the ordinary.

On November 1 the informant told Officer Harrison than Granger was in the Austin area and that the marijuana had arrived there. The informant stated that Granger was to meet Antone and Amuny at 7:00 that evening to receive the marijuana, adding that Granger was driving a white and blue Chevrolet Monte Carlo with Texas license number PCQ-658. Harrison relayed this information to Braziel. Braziel, who had been investigating Antone and Amuny since 1979, knew from another reliable informant that Antone usually conducted drug transactions in the parking lots of Jo-Jo's and Denny's restaurants located at the intersection of Oltorf Street and Interstate 35 in Austin and that Antone used a black or Hispanic male to make the pick up and delivery.

Agent Braziel and several other agents established surveillance of the residences of Antone and Amuny and of the Jo-Jo's and Denny's restaurants. Between 7:00 and 7:30 p.m., Braziel saw Antone in the Jo-Jo's parking lot standing next to a black Lincoln Continental registered to Amuny and talking with an unidentified black male. A second black male, later identified as appellant Aaron Maxwell, climbed out of a Chevrolet pickup camper and walked over to Antone and the unknown man. The three men talked briefly, and Antone and the unknown man then left in the Lincoln. Maxwell followed in his camper, and the two vehicles arrived at Antone's house a short time later.

Officer Nesteroff had been watching Amuny's residence, where a blue Oldsmobile was parked. At about 7:00 p.m., a Buick registered to Amuny arrived. Shortly thereafter,

Maxwell arrived in the camper, parked, and drove away in the blue Oldsmobile. Maxwell drove first to one of Antone's nightclubs, then to Jo-Jo's restaurant. Meanwhile, the agents at Antone's residence observed Amuny's Buick parked on the wrong side of the street and blocking Antone's driveway. Antone and Amuny got into the Buick and drove to Jo-Jo's. Agents at Jo-Jo's spotted Granger's Monte Carlo at Jo-Jo's at this time.

Ten minutes later, Maxwell left in Granger's Monte Carlo and drove to a nearby convenience store where he made a brief telephone call. He then drove to a house at 1713 Sylvan Drive that the agents believed to be a "stash house" for marijuana. Royce Hebert was the owner of this house. Maxwell drove into the garage, closing the garage door behind him. Agent Braziel, pursuing the car on foot, ran beside the house and hid in bushes near the garage. Braziel heard "thuds" of something heavy being put into the trunk of the car and then heard the trunk lid slammed. The garage door opened and Maxwell drove the car away. Braziel then approached the garage and was able to smell marijuana when he put his nose close to the door.

Maxwell drove Granger's car back to Jo-Jo's and went inside. After a few minutes Granger left the restaurant, got into his car, and drove away. The agents followed Granger to the first traffic light on an access road to the interstate and blocked his car. As the agents approached his car, they noticed a strong odor of marijuana. The agents arrested Granger and later obtained a warrant to search Granger's car. The search disclosed 56 pounds of marijuana in the trunk.

Meanwhile, other agents arrested Antone, Amuny, and Maxwell as they were leaving the restaurant. The agents

also obtained a search warrant for the house on Sylvan Drive. The search of that house disclosed a basement full of marijuana and that the two upstairs bedrooms were being used for growing, drying, and packaging marijuana. The agents also found several firearms in the master bedroom and scales and marijuana processing equipment in the hall closet. The agents found over 800 pounds of marijuana in the house, along with numerous documents and ledgers indicating marijuana buyers, amounts purchased, and prices.

After the appellants' arrest, a grand jury returned a three-count indictment against them, which was superceded by a four-count indictment. This indictment charged the appellants with distribution of marijuana, possession of marijuana with intent to distribute, and conspiracy to distribute and to possess with intent to distribute marijuana. The appellants made several pretrial evidentiary motions, which the district court denied. The appellants then entered into plea agreements under which they pleaded guilty to one count of conspiracy and preserved their rights to appeal the district court's rulings on their pretrial motions. The district court accepted the appellants' guilty pleas, sentenced each appellant to five years imprisonment, and fined each $15,000.

II. Discussion of Appellants' Cases

A. Appellant Clifford J. Antone

Antone appeals from the district court's ruling that the agents had sufficient probable cause to arrest him at Jo-Jo's without a warrant and the court's refusal on that basis to suppress his arrest and the search of his person made incident to the arrest. Antone also argues that he

pleaded guilty involuntarily and that the district court had an insufficient factual basis upon which to accept his guilty plea.

1. *Warrantless Arrest*

[1, 2] Antone contends that the agents lacked probable cause to arrest him at Jo-Jo's without a warrant. Probable cause to arrest exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed. *United States v. Woolery,* 670 F.2d 513, 515 (5th Cir.), *cert. denied,* 459 U.S. 835, 103 S.Ct. 78, 74 L.Ed.2d 75 (1982). The probable cause issue must be analyzed under the "totality of the circumstances" as to whether there is a "fair probability" that a crime is occurring. *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983); *United States v. Marbury,* 732 F.2d 390, 395-96 (5th Cir. 1984). The probable cause requirement does "not demand any showing that such a belief is correct or more likely true than false." *Texas v. Brown,* 460 U.S. 730, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983).

[3] The facts of this case indicate that the agents had probable cause to arrest Antone and to conduct a search incident to the arrest. Before Antone's arrest, the agents had received specific and detailed information concerning the marijuana transaction from informants who had provided reliable information in the past. The informants told the agents when, where, and how the transaction would occur. The agents' surveillance corroborated the informants' tips. These facts, viewed in the totality of the circumstances, established probable cause. *See United States v. Cisneros-Mireles,* 739 F.2d 1000, 1002-03 (5th

Cir. 1984); *United States v. Mendoza,* 722 F.2d 96, 101-02 (5th Cir. 1983).

2. *Factual Basis of Guilty Plea*

Antone next contends that the district court erred in accepting his guilty plea because the government failed to establish a sufficient factual basis of his guilt. Antone argues that the facts the government offered show merely that Antone was in the Jo-Jo's restaurant at the time the alleged criminal activity occurred, adding that the district court had no basis to conclude that he understood the charges against him at the time he pleaded guilty because the district court did not inform him of the "esoteric nature of the conspiracy count."

[4, 5] These contentions are meritless. To support a guilty plea, the prosecutor must present evidence to the subjective satisfaction of the district court which indicates that a defendant actually committed the offense to which he is pleading guilty. *United States v. Davila,* 698 F.2d 715 (5th Cir. 1983). At the re-arraignment hearing (at which the district court accepted the appellants' guilty pleas), the prosecutor set forth the facts he expected the evidence at trial to show and read pertinent portions of the indictment. He stated that he would introduce evidence to show that the agents observed Antone talking with a black male in Jo-Jo's parking lot on the evening of November 1 and that the agents observed Amuny and Antone drive together from Antone's residence to Jo-Jo's that evening. The prosecutor also stated that he would show that personal documents belonging to Antone were found in the agents' search of the house on Sylvan Drive and that the agents found a beeper device on Antone's person and a corresponding beeper in the house.

Finally, the prosecutor stated that eight telephone calls were made from July 1 to October 16, 1982, between a phone used by Allan Granger and Antone's residence or the beeper found on Antone at the time of his arrest. The prosecutor's presentation of these facts provided the district court with a sufficient basis on which to conclude that Antone was guilty of the offense to which he was pleading guilty.[1]

In addition, the district court followed the dictates of Rule 11 of the Federal Rules of Criminal Procedure to the letter at Antone's sentencing hearing in assessing whether Antone understood the charge against him and the significance of his guilty plea. *See United States v. Araiza,* 693 F.2d 382, 384 (5th Cir. 1982). The court specifically asked Antone whether he had committed the offenses charged, and Antone answered, "Yes, sir." The court then asked Antone: "That's what you are pleading guilty to?" and Antone again replied "Yes, sir." Moreover, Antone was represented by two competent and experi-

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1. In addition, each defendant was present when the indictment was read in open court. Count One, to which the defendants pleaded guilty, stated in pertinent part:

> On or about November 1st, 1982, in the Western District of Texas and diverse other places to the grand jurors unknown Defendants Clifford J. Antone, Mikal Habeeb Amuny, Allan Joseph Granger, Royce David Hebert also known as Roy Sneed, and Aaron Maxwell unlawfully, willfully, knowingly did combine, conspire, confederate and agree together and with each other to distribute and possess with intent to distribute marijuana, a Schedule 1 controlled substance contrary to Title 21, United States Code, Section 841(a)(1) and in violation of Title 21, United States Code, Section 846.

Thereafter the court addressed each in identical terms regarding the charge. Antone's colloquy with the court was as follows:

> THE COURT: Mr. Antone, is that what you did?
> MR. ANTONE: Yes, sir.
> THE COURT: That's what you are pleading guilty to?
> MR. ANTONE: Yes, sir.

enced criminal trial attorneys during this phase of the proceedings. Nothing in the record indicates that Antone failed to understand the charges against him. *See United States v. Dayton,* 604 F.2d 931, 938 (5th Cir. 1979) (en banc), *cert. denied,* 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980).

3. *Voluntariness of Antone's Plea*

[6] Antone's final contentions concern the voluntariness of his guilty plea and alleged government misconduct. Antone contends that the government deceived him by stating that only Royce Hebert had standing to object to the search of the house on Sylvan Drive. Because of this "misrepresentation," Antone argues, he believed that the evidence seized in the search of the house could be used against him at trial. Therefore, Antone contends, he pleaded guilty involuntarily. Antone also claims that the government violated its plea agreement with him by providing Texas authorities with information that they used to levy a sales tax on the marijuana transactions in which Antone took part.

These contentions are meritless. The record discloses no action or misrepresentation by the government that prevented Antone from establishing his standing to contest the search. *See Rakas v. Illinois,* 439 U.S. 128, 133-34, 99 S.Ct. 421, 425-26, 58 L.Ed.2d 387, 394-95 (1978). Furthermore, the record indicates that Antone had no reasonable expectation of privacy in the house. Finally, the record contains no evidence regarding the Texas tax authorities on Antone's alleged tax liability. This issue is therefore not properly before us.

B. Appellant Mikal Habeeb Amuny

Amuny argues on appeal that the agents lacked probable cause to arrest him at JoJo's restaurant and that the district court had an insufficient factual basis upon which to accept his guilty plea.

1. *Warrantless Arrest*

Amuny contends, as did Antone, that the agents lacked probable cause to arrest him as he left Jo-Jo's restaurant. Amuny's argument is identical to Antone's on this point. For the reasons stated in the discussion of Antone's argument on this issue, we hold that the district court correctly ruled that the agents had sufficient probable cause to arrest Amuny without a warrant.

2. *Factual Basis of Guilty Plea*

[7] Amuny also contends that the district court had an insufficient factual basis on which to accept his guilty plea. As we have noted earlier, the prosecutor must present evidence sufficient to provide the district court with a basis to conclude to the court's subjective satisfaction that a defedant is guilty of the offense to which he is pleading guilty before the court can accept the guilty plea. *United States v. Davila,* 698 F.2d 715 (5th Cir. 1983). Here, the prosecutor's summary of evidence to be presented at trial (which Amuny quotes and adopts as his statement of what the evidence would have shown) indicates that the district court had ample facts to satisfy itself of Amuny's guilt. These facts included evidence of Amuny's fingerprints, personal belongings, and transaction records found in the house on Sylvan Drive and testimony concerning Amuny's association with the other defendants. The district court did not err in accepting Amuny's guilty plea.

C. Appellant Aaron Maxwell

The sole issue that Maxwell raises on appeal is whether the district court properly denied his motion to suppress evidence taken from the house on Sylvan Drive. After Maxwell's arrest and indictment, he sought to challenge the agents' search of the house. Maxwell contends that he had standing to contest this search and that the magistrate lacked probable cause to issue the warrant. In ruling on Maxwell's motion to suppress, the district court concluded that Maxwell had no standing to object to the search. The court also ruled that the agents' affidavit supporting their request for a search warrant contained sufficient facts to establish probable cause and to justify the magistrate's issuance of a search warrant.

[8-10] We conclude that the district court correctly ruled that Maxwell lacked standing to contest the search of the house on Sylvan Drive. A defendant has the burden of establishing his right to contest a search or seizure of a person or property. *United States v. Salvucci,* 448 U.S. 83, 86, 100 S.Ct. 2547, 2549-50, 65 L.Ed.2d 619, 624-25 (1980). To establish standing to contest a search, the defendant must show that he had a "legitimate expectation of privacy" in the area search. *Rakas v. Illinois,* 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387, 401 (1978). A defendant's legitimate presence on the searched premises, without more, is insufficient to establish standing. *Id.* at 142-43, 99 S.Ct. 430, 58 L.Ed.2d at 400-01.

[11] Under the standard the Supreme Court has set forth, Maxwell has no standing to contest the search of the house. The agents found no clothes or personal belongings of Maxwell's in the house. Maxwell's fingerprints were found only on a spiral-ring notebook in the house.

The only evidence Maxwell presented to the district court in support of his contention were Maxwell's own affidavit and an affidavit of Royce Hebert. The district court's conclusion that Maxwell had no legitimate expectation of privacy in the house and that Maxwell therefore lacked standing to contest the search was correct. *See United States v. Briones-Garza,* 680 F.2d 417, 420 (5th Cir.), *cert. denied,* 459 U.S. 916, 103 S.Ct. 229, 74 L.Ed.2d 181 (1982). The probable cause issue is discussed in the next segment of our opinion.

D. Appellant Royce Hebert

After his arrest and indictment, Hebert moved to suppress all evidence seized from the house on Sylvan Drive, which was his residence. Hebert argued that Agent Braziel's entry onto the premises without a warrant when Maxwell drove into the garage tainted the search of the house conducted after the agents had obtained a warrant. Because of this taint, Hebert contends, the district court was required to suppress the evidence seized in the search as a "fruit of the poisonous tree."

The district court agreed that Braziel's entry onto the premises was illegal. The court, however, refused to suppress the evidence, ruling that even absent Braziel's observations sufficient probable cause existed to justify the issuance of the search warrant. The court therefore used the remedy the Supreme Court authorized in *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and "purged the taint" by redacting the portions of the agents' affidavit that related to Braziel's illegal entry. On appeal, Hebert contends that the district court's redaction remedy was insufficient to purge the evidence of the taint of Braziel's illegal entry and that the court should have suppressed the evidence.

[12, 13] A court should interpret a search warrant and its supporting probable cause in a realistic and commonsense manner. *United States v. Maestas,* 546 F.2d 1177, 1180 (5th Cir. 1977). Viewing the search warrant involved here in this manner, we conclude that the warrant was clearly based on sufficient probable cause even without the evidence supplied by Braziel's illegal entry. The affidavit the agents submitted to the magistrate to support their request for a search warrant set out numerous facts in great detail; Agent Braziel's observations constitute only a small part of the information presented to the magistrate. The district court's redaction of the search warrant and the court's ruling on the admissibility of the evidence obtained in the search of Hebert's residence were correct.

For the reasons stated, we conclude that the district court's evidentiary rulings and the court's acceptance of the appellants' guilty pleas were correct. The judgment of the district court is therefore

AFFIRMED.

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Nos. 84-1748, 84-1812, 84-1864 and 84-1878

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROYCE DAVID HEBERT, PETITIONER
v.
UNITED STATES OF AMERICA

CLIFFORD J. ANTONE, PETITIONER
v.
UNITED STATES OF AMERICA

MIKAL HABEEB AMUNY, PETITIONER
v.
UNITED STATES OF AMERICA

AARON MAXWELL, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the guilty plea proceedings showed that petitioners Antone and Amuny understood the nature of the charges against them, and whether there existed a sufficient factual basis to support the district court's acceptance of their pleas.

2. Whether there was probable cause to arrest petitioners Antone and Amuny.

3. Whether the evidence seized pursuant to a search warrant was the fruit of an antecedent illegal search (petitioners Maxwell and Hebert).

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OCTOBER TERM, 1985

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8a-20a)[1] is reported at 753 F.2d 1301. The opinion of the district court (Pet. App. 1a-7a) is unreported.

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[1]Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 84-1864.

JURISDICTION

The opinion of the court of appeals was rendered on February 11, 1985, and rehearing was denied for Nos. 84-1812 and 84-1878 on March 15, 1985; and for No. 84-1864 on March 25 (rehearing was not sought in No. 84-1748). The petitions for a writ of certiorari were filed in No. 84-1748 on May 4, 1985; in No. 84-1878 on May 9, 1985; in No. 84-1812 on May 14, 1985; and in No. 84-1864 on May 24, 1985. The petition in No. 84-1748 was not timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were indicted in the United States District Court for the Western District of Texas on charges relating to marijuana possession and distribution. Following the district court's denial of petitioners' motions to suppress evidence, petitioners each pleaded guilty to one count of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846, reserving their rights to appeal the district court's rulings. Each petitioner was sentenced to five years' imprisonment and a $15,000 fine. The court of appeals affirmed.

1. On October 28 and 29, 1982, Customs Patrol Officer Harrison contacted DEA Special Agent Braziel and informed him that Allen Granger and an individual identified as "Randy" were on their way to Austin, Texas, to meet petitioners Clifford Antone and Mikal Amuny to pick up a quantity of marijuana, which was being flown there.[2] Harrison advised Braziel that he had received this information from a confidential informant who in the past had provided information leading to six arrests and the seizure of a quantity of marijuana, and that the informant was getting his

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[2]Unless otherwise indicated, the statement of facts is taken from the opinions of the court of appeals and the district court.

information in this instance through conversations with Granger. On November 1, 1982, Harrison advised Agent Braziel that the marijuana had been landed in Austin and that Granger, driving a blue and white Chevrolet Monte Carlo with Texas license plate number PCQ-658, would meet Antone and Amuny at 7:00 that evening to pick up the substance.

As a result of prior investigations of Antone and Amuny, Braziel was aware from a separate source that Antone conducted marijuana transactions at JoJo's Restaurant near the intersection of Interstate 35 and Oltorf Road in Austin, Texas, and that he used a black or Hispanic male to deliver the marijuana. Braziel placed the restaurant at that intersection under surveillance on the evening of November 1, 1982. He saw Antone and an unidentified black male meet with petitioner Aaron Maxwell in the restaurant parking lot. Maxwell subsequently drove to Amuny's residence, left his pickup there, and drove back to JoJo's in another car. In JoJo's parking lot, Maxwell entered Granger's vehicle—the blue and white Chevrolet Monte Carlo with Texas license plate PCQ-658 that the informant had identified—drove to a convenience store, used its phone, and proceeded to a residence leased by petitioner Royce Hebert. When Maxwell drove the car into the garage and closed the door, Agent Braziel followed him on foot, and, while hiding in the bushes near the garage, heard the trunk of a car open, something being loaded into the trunk, and the trunk close. When he put his nose close to the garage door, he smelled marijuana. Maxwell then drove Granger's automobile back to JoJo's restaurant and went inside. Shortly thereafter, Granger walked out of the restaurant, drove away in his car, and was arrested at a red light. As the arresting officers approached Granger's car, they smelled marijuana. Agent Braziel seized the automobile and, after a warrant to search it was obtained, discovered 58 pounds of marijuana in the car trunk.

Meanwhile, other agents arrested Antone, Amuny,[3] and Maxwell as they were leaving JoJo's restaurant. Agent Braziel also obtained a federal search warrant for Hebert's residence. That search uncovered over 800 pounds of marijuana, several firearms, scales, processing and packaging equipment, and numerous documents and ledgers indicating marijuana buyers, amounts purchased, and prices. A beeper device found on Antone's person incident to his arrest corresponded to a beeper found in the house. Eight phone calls had been made by Granger to Antone's home or the beeper prior to the arrests. See 84-1864 Pet. 5; Jan. 30, 1984 Tr. of Re-Arraignment Proceeding [hereinafter cited as Tr. of Re-Arraignment] 42. Finally, the search revealed personal documents of Antone and Amuny, and fingerprints of Amuny and Maxwell.

2. The district court denied motions to suppress the evidence discovered in the search of Hebert's residence. It concluded (Pet. App. 5a-6a) that Maxwell, Antone, and Amuny did not have "standing" to challenge that search. Despite an affidavit submitted by Maxwell asserting a privacy interest in Hebert's residence, a post-search investigation did not reveal any keys, clothes, or other indicia that he resided there (*id.* at 4a-5a, 6a). Antone and Amuny did not produce any evidence to support any claim they might have had to a privacy expectation in the contents of the home (*id.* at 5a).

Hebert's argument that the search warrant authorizing the search of his residence was tainted by Agent Braziel's preceding unlawful search of the property was rejected on the merits. The district court agreed that Agent Braziel trespassed on the property of Hebert's residence, reasoning that "listening at the garage door and pressing his nose to

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[3]Earlier in the evening, Antone and Amuny had driven to JoJo's together from Antone's house.

that door constituted an invasion of the curtilage of that property sufficient to constitute a search without warrant" (Pet. App. 7a). Accordingly, the district court, citing *Franks* v. *Delaware*, 438 U.S. 154 (1978), struck from the affidavit supporting the search the statement regarding the three thuds Agent Braziel heard while listening at the garage (Pet App. 7a).[4] Even without that information, however, the court found that "the affidavit contains sufficient remaining facts to support the search" and denied Hebert's motion to suppress (*ibid.*).

The district court also concluded (Pet. App. 5a-6a) that there was probable cause to arrest Amuny, Antone, and Maxwell. (Hebert did not challenge the lawfulness of his arrest, apart from his effort to suppress the evidence at his residence.) The court noted that the informant's information provided sufficient detailed facts from which the officers could believe that a crime was being committed, and that the "past reliability of the informant and the corroboration of other law enforcement officers' independent investigation meets the totality of the circumstances test of *Illinois* v. *Gates*, [462 U.S. 213 (1983)]" (Pet. App. 5a).

Having lost their pretrial motions, petitioners each pleaded guilty to one count of conspiracy to possess marijuana with intent to distribute. They reserved the right to appeal the district court's rulings on the suppression motions, and did so.

3. The court of appeals affirmed. After reviewing the summary of the evidence presented by the prosecutor at the

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[4]The warrant application, signed by Braziel, set out in five detailed paragraphs the facts briefly described at pages 2-4, *supra*. The two sentences redacted out read: "Special Agent Braziel further heard a car trunk lid being opened. Further, Special Agent Braziel heard a noise like heavy objects being thrown of a trunk in a vehicle, after which the trunk lid slammed." See U.S. Br. in the Court of Appeals 17-19.

rearraignment, the court rejected arguments by Antone and Amuny that there was not a sufficient factual basis to warrant the district court's acceptance of their pleas (Pet. App. 14a-16a, 17a-18a). The court similarly rejected Antone's contention that the district court had no basis to conclude that he understood the charges against him, finding instead that "the district court followed the dictates of Rule 11 of the Federal Rules of Criminal Procedure to the letter" in determining that Antone understood the charges, and that "[n]othing in the record indicates that Antone failed to understand the charges against him" (Pet. App. 16a). The court below also concluded (*id.* at 13a-14a, 17a) that there was probable cause to arrest Antone and Amuny. The court reasoned that the agents had received "specific and detailed information" of "when, where, and how" the marijuana transaction would occur from "informants who had provided reliable information in the past," and that the agents' own surveillance had corroborated those tips (*id.* at 14a).[5]

Finally, the court of appeals agreed with the district court that Maxwell lacked standing to challenge the search of Hebert's residence because he had no legitimate expectation of privacy in it, and it rejected Hebert's argument that the district court was required to suppress the evidence seized in the search of the house because the warrant was tainted by Agent Braziel's earlier trespass (Pet. App. 18a-20a). Reasoning that the warrant "set out numerous facts in great detail," of which Agent Braziel's observations constituted "only a

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[5]Antone also argued to the court of appeals that the government deceived him by stating that only Hebert had standing to object to the search of his house and that the government violated its plea agreement with him by providing Texas authorities with information they used to levy a sales tax on his marijuana transactions. The court of appeals rejected these claims as "meritless" and without basis in the record (Pet. App. 16a-17a), and Antone does not raise them in his petition.

small part," the court found that "the warrant was clearly based on sufficient probable cause even without the evidence supplied by Braziel's illegal entry" (*id.* at 20a).

ARGUMENT

The fact-bound issues raised by petitioners were correctly decided by the courts below and involve no points regarding which there is disagreement among the circuit courts. Further review by this Court is unwarranted.

1. Petitioners Antone and Amuny contend that their guilty pleas are invalid because the charges against them were not adequately explained in the Rule 11 proceeding. They claim further that their pleas were erroneously accepted because they were not supported by a sufficient factual basis. These claims are without merit.

a. Petitioners Antone and Amuny [6] maintain (84-1812 Pet. 6-9; 84-1864 Pet. 13-17) that the court of appeals utilized the wrong standard in ascertaining whether the record established that they understood the nature of the charges to which they pleaded guilty. Antone, for instance, contends that the court of appeals' conclusion that "[n]othing in the record indicates that [he] failed to understand the charges against him" (see Pet. App. 16a) is a "negative standard" that conflicts with decisions of this Court, earlier decisions of the court below, and decisions in other circuits (84-1812 Pet. 6). Without suggesting that they in fact failed in the slightest to understand the charge to which they pleaded, petitioners assert that these decisions, and Rule 11 of the Federal Rules of Criminal Procedure, establish that the record of a guilty plea's acceptance must affirmatively demonstrate a defendant's understanding of the charges against him, which, they contend, the record here does not do.

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[6] We note that Amuny did not raise this claim before the court of appeals.

The record here, however, *does* affirmatively demonstrate that petitioners understood the nature of the charges to which they pleaded guilty, thus undercutting the premise of their contention. As the court below determined, the proceedings fully comported with Rule 11. The statement by the court seized upon by petitioner Antone as evincing the use of a "negative standard" supports their contentions only if taken wholly out of context.

At the rearraignment, the district court judge meticulously assessed whether petitioners understood the charges to which they were pleading guilty. Petitioners said they understood the charges (Tr. of Re-Arraignment 30), had no questions about them (*ibid.*), had discussed them with their lawyers (*id.* at 18, 24-25, 29), and had done and were pleading guilty to what the indictment said (*id.* at 37). The lawyers too expressed their belief that petitioners understood the proceedings (*id.* at 6). The district judge also found that petitioners "fully understood the charges" (*id.* at 47). Besides the fact that each petitioner and his lawyer said he understood the charges, there was abundant other evidence to support the district judge's finding. Petitioners were told twice that they were being charged with conspiracy to possess and distribute marijuana (*id.* at 23), a reasonably self-explanatory charge that is not difficult to understand. See *United States* v. *Dayton,* 604 F.2d 931, 938, 941-943 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 904 (1980). Amuny had a college degree (Tr. of Re-Arraignment 5) and had been convicted of possession of marijuana before (84-1864 Pet. 6); Antone had graduated from high school (Tr. of Re-Arraignment 5). Each heard the indictment (*id.* at 35-37) and the outline of the evidence the government would present read to him at the rearraignment (*id.* at 38-42). It was, therefore, correct for the district court to conclude that petitioners understood the charges against them—and for

the court of appeals to find this conclusion supported by the record. Compare *Brown* v. *Perini,* 718 F.2d 784 (6th Cir. 1983).[7]

Moreover, even if it were concluded that a more detailed explanation of the charge was required by Rule 11, the failure to do so would be harmless error here in light of the extensive record at the rearraignment hearing. See Fed. R. Crim. P. 11(h). It is simply implausible that these defendants, both represented by counsel, and both competent and reasonably well-educated, would not be able to understand a rather simple charge presented to them in the well-explained context it was (of course, petitioners do not assert that they did not in fact understand the charge). As the Advisory Committee noted when recommending the addition of an explicit harmless error provision in 1983, "Rule 11 should not be given such a crabbed interpretation that ceremony [is] exalted over substance." [8] While the cases

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[7]In the cases cited by petitioner Antone (84-1812 Pet. 7-9), the district court record had substantially less evidence in it that defendant understood the charges against him. Moreover, a number of the cases he cites involved instances where the record contained affirmative evidence that the guilty plea was in some way actually defective, which no one argues is the case here. Cases more on point than petitioner's include: *United States* v. *Thompson,* 680 F.2d 1145, 1153-1155 (7th Cir.), cert. denied, 459 U.S. 1089 (1982) and 459 U.S. 1108 (1983) ("It is sufficient if the colloquy between the court and the defendant would lead a reasonable person to believe that the defendant understood the nature of the charge."); *United States* v. *Coronado,* 554 F.2d 166 (5th Cir.), cert. denied, 434 U.S. 870 (1977) (discussed note 8, *infra*); *Seiller* v. *United States,* 544 F.2d 554, 562-563 (2d Cir. 1975) ("We hold that the district court here was amply justified in relying on the reading of the indictment, coupled with [defendant's] discussions with his attorney, his age (47), his university education, his representation by counsel, his 'alacrity of responses and his show of intelligence'—in short, the court's total impression of the defendant and his understanding of the proceedings—to establish that [he] understood the nature of the charges" (citations omitted).).

[8]An illustration of harmless error under Rule 11(h) given by the Committee was "where the judge's compliance with subdivision (c)(1) was not absolutely complete, in that some essential element of the crime

cited by petitioner Antone (84-1812 Pet. 7-9) are otherwise distinguishable as well (see note 7, *supra*), all but two antedate Rule 11(h) and only one—another Fifth Circuit case—reverses a conviction after consideration of the rule.[9] The new rule is already changing the law in the circuits. See *United States* v. *de le Puente,* 755 F.2d 313, 314-315 (3d Cir. 1985), petition for cert. pending, No. 85-178; *United States* v. *Stead,* 746 F.2d 355, 356-357 (6th Cir. 1984), cert. denied, No. 84-6137 (Mar. 4, 1985); see also *United States* v. *Kearney*, 750 F.2d 787, 790-791 (9th Cir. 1984).

Especially in light of its conclusion that there was no violation of Rule ll, the court of appeals' statement that "[n]othing in the record indicates that Antone failed to understand the charges against him" (Pet. App. 16a) cannot reasonably be understood to establish some significant new standard for assessing Rule 11 violations. Rather, the statement appears to mean simply that there is nothing in the record of the plea proceedings that undercuts the conclusion suggested by that record that petitioners understood the charges to which they pleaded guilty. In light of the record and the court's entire opinion, it is abundantly

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was not mentioned, but the defendant's responses clearly indicate his awareness of that element." The note approvingly cites *United States* v. *Coronado, supra,* where, as the Committee had explained earlier, the court first held that the charge of conspiracy requires some explanation of what conspiracy means to comply with Rule 11(c)(1), but then found no reversible error "because the rule 11 proceeding on its face discloses, despite the trial court's failure sufficiently to make the required explication of the charges, that [defendant] understood them" (554 F.2d at 173).

[9] *United States* v. *Corbett,* 742 F.2d 173, 178-179 (5th Cir. 1984), found a Rule 11 proceeding prejudicially defective where the information counts were not read to defendant and defendant had not received a copy of them. As discussed above, that is not the case here.

clear that petitioners understood the charges to which they pleaded guilty. Thus, their claim was properly rejected.[10]

b. Antone and Amuny also maintain (84-1812 Pet. 9-12; 84-1864 Pet. 7-12) that there was not a sufficient factual basis to support the district court's acceptance of their guilty pleas. However, the prosecutor recited a convincing and lengthy factual basis (84-1864 Pet. 3-7), and read pertinent portions of the indictment in support of the pleas of guilty (Tr. of Re-Arraignment 34-37). In summary, he stated that he would introduce evidence that on November 1, 1982, Antone met with petitioner Maxwell at JoJo's parking lot. Later, Antone and Amuny drove together from Antone's home to JoJo's Restaurant. Maxwell, meanwhile, drove to Amuny's residence, switched cars, and returned to the restaurant. Maxwell then picked up Granger's car, drove to Hebert's residence, and returned to JoJo's. The driver of the car, Granger, was then arrested and 58 pounds of marijuana found in the trunk of the automobile. Personal documents belonging to Antone and Amuny were found in the search of the residence which also uncovered approximately 800 pounds of marijuana. Also found during the search were Amuny's fingerprints and a beeper that corresponded to one worn by Antone. Eight phone calls from Granger were made to Antone's home or beeper from July 1 to October 16, 1982. Several days prior to the arrests, Amuny's car was observed at Browning Aerial Service at

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[10]Petitioner Antone further argues (84-1812 Pet. 11-12) that his plea cannot have been voluntary because he did not admit that the evidence the government would present was true (Tr. of Re-Arraignment 44). On its face this argument seems to go to the factual basis of the plea (Fed. R. Crim. P. 11(f)), rather than its voluntariness (Rule 11(d)), though it is unconvincing in that context as well (see note 11, *infra*). In any event, even with petitioner's eleventh-hour reservations about whether he would endorse the government's evidence, there was more than enough in the record to support the district court's finding, and the court of appeals' affirmance, that the plea was voluntary, understanding, *and* factually based.

the Austin Airport. Amuny had been convicted in 1973 of possession of 150 pounds of marijuana. Finally, because of the evidentiary proceedings on the motion to suppress, the judge was aware of additional facts supporting the charges against petitioners (see Pet. App. 1a-7a).

Thus, the district court specifically found that there was a factual basis to support each of the defendants' pleas (Tr. of Re-arraignment 47). Following a review of the prosecutor's proffer to the district court and of the indictment, the court of appeals agreed (Pet. App. 14a-15a, 17a-18a). Given these concurrent factual findings by both lower courts, review by this Court of petitioners' fact-bound claims is unwarranted.[11]

2. Petitioners Antone and Amuny also contend (84-1812 Pet. 4-6; 84-1864 Pet. 17) that their arrests were not supported by probable cause. Since it does not appear that any evidence used by the prosecution was seized from petitioner

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[11]Antone confuses (84-1812 Pet. 10-12) the voluntariness issue with the sufficient factual basis issue (see note 10, *supra*). As we discuss in the preceding point, his plea was voluntary; it also had a sufficient factual basis. It is not necessary to the existence of a sufficient factual basis that defendant admit the facts the prosecution says it will present; all that is necessary, as the Fifth Circuit said (Pet. App. 14a), is that "the prosecutor * * * present evidence to the subjective satisfaction of the district court which indicates that a defendant actually committed the offense to which he is pleading guilty. *United States* v. *Davila*, 698 F.2d 715 (5th Cir. 1983)." See also *United States* v. *Dayton*, 604 F.2d 931, 938 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 904 (1980). Cf. *North Carolina* v. *Alford*, 400 U.S. 25 (1970). Despite Amuny's and Antone's arguments that there was an inadequate factual basis for the conspiracy and intent elements of the charge, respectively, the evidence outlined above could certainly satisfy a judge that those elements were present. (There is also no indication here of any motive for petitioners to plead guilty to crimes they did not commit, especially if they thought the prosecutor possessed an inadequate factual basis to establish guilt. Compare *North Carolina* v. *Alford*, *supra*.)

Amuny incident to his arrest, the legality of that arrest is immaterial to the validity of his conviction. In any event, for many of the same reasons that there existed an adequate factual basis for petitioners' guilty pleas, there was also probable cause for their arrests.

Before the arrests, the agents had received "specific and detailed information" from reliable informants concerning a planned sale of marijuana by petitioners to Granger (Pet. App. 14a). As the court of appeals observed, the "informants told the agents when, where and how the transaction would occur," and "the agents' surveillance corroborated the informants' tips" (*ibid.*). For instance, Antone was observed meeting with Maxwell at a location identified by an informant as the likely site of the transaction, Maxwell then drove to Amuny's and later drove Granger's car, with the make and license plate identified by the informant, to Hebert's to pick up the marijuana, returning to the restaurant where Granger waited and where petitioners were also present. Viewed in the "totality of the circumstances" (see *Illinois* v. *Gates*, 462 U.S. 213 (1983)) there was ample basis for the findings below that probable cause existed to arrest Antone and Amuny (Pet. App. 7a, 17a-18a).

3. Petitioners Maxwell[12] and Hebert contend (84-1878 Pet. 10-14; 84-1748 Pet. 7-11) that the evidence discovered

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[12]Petitioner Maxwell was held by the courts below to lack "standing" to challenge the warrant to search Hebert's house, on the ground that he had failed to establish a reasonable expectation of privacy in those premises (Pet. App. 6a, 18a-19a). He contends (84-1878 Pet. 7-10) that his right of access to the house was indeed sufficient to afford him a right of privacy therein. We think that both petitioner and the courts below address the wrong question. The relevant privacy interest is not that affected by the execution of the warrant, but that infringed by the action found to be illegal—Agent Braziel's trespass upon the property to hear and smell what was happening in the garage. While this entirely distinct "standing" issue raises an interesting, if somewhat obscure, point, there is surely no need to consider it here because, as explained in text, the evidence seized under the warrant was not a fruit of any illegality committed by Agent Braziel.

during the search of Hebert's residence should have been suppressed because the search warrant was tainted by Agent Braziel's earlier illegal trespass on Hebert's property. This contention was rejected on the ground that the showing of probable cause to support issuance of the warrant did not depend on the information thus gained (Pet. App. 13a). In such circumstances, the courts have traditionally held that evidence seized pursuant to the warrant is not a tainted fruit of the illegally obtained information contained in the warrant affidavit. See, *e.g., United States* v. *Karo,* No. 83-850 (July 3, 1984), slip op. 13-15; *United States* v. *Smith,* 730 F.2d 1052, 1056 (6th Cir. 1984); *United States* v. *Taborda,* 635 F.2d 131, 140-141 (2d Cir. 1980); *United States* v. *House,* 604 F.2d 1135, 1143 (8th Cir. 1979), cert. denied, 445 U.S. 931 (1980); *United States* v. *Watts,* 540 F.2d 1093, 1095 n.2 (D.C. Cir. 1976). See also *United States* v. *Marchand,* 564 F.2d 983, 992-995 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978) (Friendly, J.) (collecting the cases and discussing the rule's rationale). This Court has applied the same analysis in deciding whether deliberately or recklessly false statements in the affidavit invalidate the warrant. *Franks* v. *Delaware,* 438 U.S. 154, 171-172 (1978).[13]

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[13]There is not, as suggested by petitioner Maxwell (see 84-1878 Pet. 13), a conflict among the circuits on the appropriate standard to apply when assessing a search warrant containing information from an antecedent illegal search. Contrary to Maxwell's claim, the Sixth Circuit does follow the approach in *Franks* and *Karo,* and will uphold a warrant if, after excluding illegally obtained information, the balance of the affidavit establishes probable cause. See, *e.g., United States* v. *Smith,* 730 F.2d 1052, 1056 (6th Cir. 1984); *United States* v. *Korman,* 614 F.2d 541, 547 (6th Cir.), cert. denied, 446 U.S. 952 (1980). The two cases cited by petitioner are not in any way inconsistent with the approach taken in *Franks* and *Karo*—see *United States* v. *Giordano,* 416 U.S. 505, 556 n.6 (Powell, J., concurring in part and dissenting in part); *United States* v. *Grunsfeld,* 558 F.2d 1231, 1241 (6th Cir.), cert. denied, 434 U.S. 872 (1977) and 434 U.S. 1016 (1978)—and were, in any event, decided before them and the more recent Sixth Circuit cases. Maxwell does not claim that any other circuit (besides the Sixth) is in disagreement with the approach taken by the Fifth Circuit in this case.

Petitioners suggest that this analysis has been placed in doubt by *Segura* v. *United States,* No. 82-5298 (July 5, 1984). In Hebert's view (84-1748 Pet. 7-11), *Segura* formulated a test that looks instead to whether the prior illegal intrusion contributed in any way to the discovery of the evidence seized under the search warrant. We are not sure that this formulation reaches a result different from the traditional approach: if there is probable cause even after the illegal evidence is excised from the warrant, it is difficult to see how it contributes to the finding of subsequent evidence. Similarly, the "critical element" formulation advocated by petitioner Maxwell (84-1878 Pet. 10-13) appears to be, even on its own terms, really nothing more than the traditional *Franks* test: if there was adequate evidence to support the warrant when the illegal evidence is excised (*i.e.,* if that evidence is not "critical"), then the warrant is valid. See *Segura,* slip op. 19. That test is met here.

In any event, petitioners' contention that *Segura* creates a new rule is absurd. This Court gave no indication it was undertaking such a dramatic reversal; indeed, just two days earlier, in *United States* v. *Karo,* No. 83-850 (July 3, 1984), slip op. 13, the Court had reaffirmed the *Franks* approach. In *Karo,* in the context of cleansing a tainted warrant, the Court stated that, despite the presence in the supporting affidavit of illegal evidence, "if sufficient untainted evidence was presented in the warrant affidavit to establish probable cause, the warrant was nonetheless valid." That is precisely the situation here. *Segura,* on the other hand, had nothing to do with a "cleansed" warrant.

In any event, *Segura* stated that "[w]hether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized" (slip op. 17) and that "our cases make clear that evidence will not be excluded as 'fruit' unless the illegality is

at least the 'but for' cause of the discovery of the evidence" (*id.* at 19). These principles, of course, would indicate that *Franks* and *Karo* are still viable. So does *Segura's* holding: if the illegal prior entry there did not invalidate an otherwise valid search warrant, there is no reason why the prior trespass here should invalidate a search warrant valid once cleansed. Petitioners' attempt to manufacture a new—and vague and confusing—standard from *Segura* by taking phrases from it out of context is wholly unconvincing.

Only two sentences in Braziel's lengthy affidavit (see note 4, *supra*) contained evidence relating to his earlier observations at Hebert's residence, which the district court believed were the product of an impermissible trespass.[14] The district court reviewed the warrant, leaving out those two sentences, and found that it contained "sufficient remaining facts to support the search" (Pet. App. 7a). As the court of appeals observed (*id.* at 20a), the "request for a search warrant set out numerous facts in great detail," of which Agent Braziel's allegedly illegal observations constituted "only a small part." Thus, the court correctly concluded, "the warrant was clearly based on sufficient probable cause even without the evidence supplied by Braziel's illegal entry" (*ibid.*).[15]

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[14]We do not concede that the district judge properly excluded Agent Braziel's observations. Nevertheless, because the information is not necessary to the warrant's validity, this brief assumes that the ruling was correct.

[15]Hebert also complains (84-1748 Pet. 11-13) that the court below erred in failing to strike from the warrant affidavit as a fruit of Braziel's earlier illegal search the agent's observations concerning Granger's arrest. But probable cause to stop and arrest Granger existed without Braziel's observations at the residence, for the same reasons that there was probable cause to arrest petitioners Antone and Amuny (see pages 12-13, *supra*).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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